SUPREME COURT, U. S.

JUN 15 1961

JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

GERTRUDE WOOTEN,
Respondent.

No. ~~937~~ 107 y61

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE PENNSYLVANIA RAILROAD COMPANY, Petitioner,		
v.		No. 987.
GERTRUDE WOOTEN, Respondent.		

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

This is a diversity common-law negligence action brought by Respondent, a citizen of Indiana and a resident of Indianapolis, in the United States District Court for the Southern District of Indiana, Indianapolis Division, against the Petitioner railroad company, a corporate citizen of Pennsylvania, doing business in the Southern District of Indiana, to recover damages received by her due to alleged negligence of the Petitioner, its agents, or a partner of Petitioner, while Respondent was being transported on Petitioner's through train running between Chicago, Illinois, and points on the east coast of Florida.

A general verdict for Respondent was returned by the jury, upon which the District Court entered judgment. Petitioner appealed and the United States Court of Appeals for the Seventh Circuit on March 20, 1961, affirmed the judgment of the District Court. On appeal, Petitioner did not question the extent of Respondent's injuries or the amount of the verdict. Therefore, evidence relating to injuries and damages does not appear in the Record. Petitioner now seeks review of the judgment of the Court of Appeals by writ of certiorari.

It is charged in the amended complaint (A., pp. 1-4) that the Petitioner, with other railroad companies acting either in an agency or in a partnership relationship with Petitioner, operated a through train called the "South Wind" from Chicago, Illinois, to points in Florida and return; that the Petitioner undertook either as principal or as a partner to transport Respondent on said train from Indianapolis, Indiana, to Jacksonville, Florida, on through passenger and seat tickets issued by Petitioner as "issuing carrier" and sold to Respondent by Petitioner's selling agent, Indianapolis Union Railway Company; that while the train was traveling on a track of one of the other railroad companies a piece of baggage was shaken off an overhead rack and fell and struck Respondent while she was asleep in a reclining seat below and seriously injured her; and that her injuries were caused by negligence of the Petitioner, and its agents or of its partner in that (1) they negligently permitted the baggage to remain loose on the overhead racks during sleeping hours in the nighttime,

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The following references are used in this Brief:

Petitioner's Appendix as printed for the use of the Court below	"A"
Stipulation of Facts	"S"
Exhibit to the Stipulation of Facts	"Sx"
Original Exhibit	"Ox"
Deposition	"D"
Petition for Certiorari	"Pet. Cert."

and (2) they operated the train in a negligent manner, causing the baggage to be shaken off the rack and to strike and injure Respondent while asleep and unable to protect herself against it. These averments are denied in Petitioner's answer. No affirmative defense is pleaded (A., pp. 5, 6).

Respondent supplements herein Petitioner's Statement of the Case insofar as that statement omits or does not fully set forth the following material facts which the jury had a right to consider:

The detour track on which the train was being operated at the time of the accident was a rough freight track on which the train rocked and shook, shaking the baggage on the overhead racks (A., pp. 96-97, D of Grants). The distance from Birmingham, Alabama, to the Alabama-Georgia State Line on this rough track was approximately 147 miles (A., p. 53).

The coach attendants on this train were on duty all the way from Chicago to Jacksonville, Florida, and were in the employ of the Petitioner (A., pp. 120-123). Petitioner formerly provided a coach attendant for each coach car, but cut that number so that each attendant had two cars to look after (A., p. 91, D of Grants). Carrell West was a coach attendant on this train and had been ever since it was inaugurated in December of 1940 (A., p. 58, D of West). The duties of a coach attendant included the duty to check the luggage on the racks to see to it that it is properly placed (A., p. 60, D of West). West wore a uniform and cap bearing Petitioner's insignia "PRR" (A., p. 66, D of West). As coach attendant he performed the duties which the Petitioner gave him to do. If the conductor asked him to do something he did that, but otherwise he did the things the Petitioner had trained and told him to do (A., p. 61, D of West). He was in his rest

period at the time of this accident (A., pp. 65-66, D of West).

The only other coach attendant on this train was Vandor Grants, who had five cars to look after during West's rest period (A., p. 91, D of Grants). His duties included the duty of putting baggage on the racks and going through the cars to see to it that the baggage on the racks is pushed back so that it would not fall down (A., pp. 89-90, D of Grants). He had not been in the car in which the accident happened for about a half hour prior thereto (A., p. 102, D of Grants). He wore a uniform on duty and a cap bearing Petitioner's insignia "PRR" (A., p. 92, D of Grants).

In addition to Petitioner's two coach attendants, fifteen other employees of the Petitioner were on duty on this train all the way from Chicago to Jacksonville. These consisted of the dining car crews and a bar-lounge attendant (A., p. 140, S par. 11). All of these seventeen employees of the Petitioner participated in the operation of this train all the way to Jacksonville and were paid for their services **entirely by the Petitioner** (A., pp. 120-123).

The South Wind train on this trip was made up by the Petitioner at Chicago and consisted of eighteen cars and three diesel locomotives. The Petitioner owned a majority of the locomotives and cars (A., p. 140, S par. 9). The Petitioner advertised this train in a timetable folder, which it published and distributed and which Respondent used (Ox 7 to the S; A., p. 10). This timetable was devoted exclusively to the South Wind and advertised the train as providing through service from Chicago to Florida via Indianapolis and on which reclining coach car seats could be reserved from Chicago to Jacksonville. The timetable is headed in large bold face type letters:

"PENNSYLVANIA RAILROAD
SERVING THE NATION
THROUGH SERVICE -CHICAGO-
INDIANAPOLIS -FLORIDA"

(Ox 7 to the S)

The South Wind was also advertised by Petitioner as offering through service from Chicago to both Florida coasts in a display advertisement which Petitioner placed in the official railway guide (Ox 8 to the S).

There are in evidence three written agreements, constituting all the written agreements between Petitioner and the Atlantic Coast Line Railroad Company concerning the operation of the South Wind train (A., pp. 147-162, Sx 3, 4, 5, 6). The first, consisting of two letters, constitutes the agreement initially entered into when operation of the train began in December of 1940 (A., pp. 147-150, Sx 3, 4). In one of these letters Atlantic Coast Line Railroad Company prescribed the terms and conditions on which the equipment proposed by the Petitioner could be operated over its line. One of these conditions was that Atlantic would not participate in any costs for coach attendants or for other specified train employees. Another condition required Petitioner to execute an indemnity agreement "covering liability for the acts or omissions of its employees when operating over the Atlantic Coast Line Railroad." These and other terms and conditions in this first agreement were accepted in writing by Petitioner (A., pp. 148, 149, Sx 3).

The second written agreement is the aforementioned indemnity agreement required from Petitioner by Atlantic. In the preamble the Petitioner recites that "certain passenger cars and diners of The Pennsylvania Railroad Company . . . in charge of and manned by employees of the

Pennsylvania move over certain portions of the line of railroad of Atlantic Coast Line Railroad Company . . . for the purpose of enabling the Pennsylvania to serve meals and also to carry, handle, sell and dispense thereon lawful beverages, drinks and drinkable liquids," and in this agreement the Petitioner assumes responsibility and liability for and indemnifies the Atlantic Coast Line Railroad Company against loss or damage "(2) by reason of any injury to person or persons . . . occasioned by or arising out of any negligent act or omission of the Pennsylvania, its officers, agents or employees, while upon the property or railroad of the Atlantic for the aforesaid purposes in connection with such passenger or dining cars" (A., pp. 151, 152, Sx 5).

The third agreement is between Petitioner, the Atlantic Coast Line Railroad Company (hereinafter called "Atlantic") and the Louisville and Nashville Railroad Company (hereinafter called "L. & N.") concerning the furnishing of the diesel locomotives for the South Wind train and the pooling and apportioning of the locomotive expenses on a mileage basis (A., pp. 153-162, Sx 6). In the preamble the parties recite that "the parties hereto operate a through train between Chicago, Illinois, and Jacksonville, Florida, known as the 'South Wind' train" (A., p. 153). And in Section VI they refer to these locomotives as being "operated in joint service under this agreement" (A., p. 158). The agreement provided that the Petitioner and Atlantic shall furnish the locomotives for this train and that the L. & N. shall pay them a rental for having them on its line (A., pp. 153, 154); that the servicing costs shall be pooled (A., p. 156) and that the Petitioner shall act as a "clearing house" for distributing the same among the parties (A., p. 157); and other details, including indemnities, are provided (A., pp. 159-161).

In practice the passenger fares that are collected by Petitioner for through service on the South Wind train to Florida are divided by the Petitioner with the Atlantic and the L. & N. on a mileage basis, but not the seat charge. The special reserved coach seat charge for a seat from Indianapolis, Indiana, to Jacksonville, Florida, is retained entirely by the Petitioner (A., p. 142, S par. 14).

At Indianapolis the Petitioner by its selling agent, Indianapolis Union Railway Company, issued round trip passenger tickets and round trip reserved seat tickets to Jacksonville and return for passage on the South Wind train (A., p. 136, S par. 3). The ticket sold to Respondent was in a strip of eight detachable parts, each headed by the name "INDIANAPOLIS UNION RAILWAY CO." and each designating "Jacksonville, Fla." as the only destination and each designating the Petitioner by its letters "PRR" as the "ISSUING CARRIER." There is nothing stated or shown on any part of this ticket as to any relationship existing between Petitioner, the Atlantic or the L. & N. Their names appear by their initials on the six detachable parts following the first two, indicating only the lines of the route between the named cities (A., p. 145, Sx 1).

Petitioner also issued as the "ISSUING CARRIER" and sold by its said selling agent to Respondent a three-part reserved seat ticket to Jacksonville. This ticket was for a through seat reservation in a through coach car. A return seat reservation ticket in three parts was also issued by the Petitioner and sold by its said selling agent at Indianapolis to the Respondent. Neither the names of the Atlantic or of the L. & N. appear by initial or otherwise on the seat tickets. Only the names of the Petitioner ("PRR") as the "ISSUING CARRIER," and of Petitioner's said selling agent appear on the seat tickets (A., p. 146, Sx 2).

In each detachable part of both the passenger and the seat tickets issued by the Petitioner for use on said South Wind train and sold by Indianapolis Union Railway Company as Petitioner's selling agent there appears in small print a statement as follows:

> "Subject to tariffs. Selling carrier is agent only—not responsible beyond its line, except as law imposes liability for baggage. Non-transferable."

Said statement appears on all tickets sold by Petitioner's said selling agent for transportation on the South Wind train irrespective of whether the destination specified in the ticket is beyond or on Petitioner's own line (A., p. 139, S par. 7). Petitioner's said selling agent, Indianapolis Union Railway Company, whose name heads part of said tickets, is itself a railroad carrier, owning and operating the Union Station at Indianapolis and the tracks therein and the approaches thereto and it receipts for and handles all baggage car baggage that is transported on trains using the station, including the South Wind. It also services said train by inspecting and oiling its axles at said station (A., pp. 136-137, S pars. 4 and 5).

Common carriers of passengers in Alabama are required to exercise the "highest degree of care," and in Georgia they are required to exercise "extraordinary diligence" for the protection of their passengers.

There was uncontroverted testimony by an eye witness that the accident occurred at or near Cragford, Alabama (A., p. 109, D of Hansen); that no person was near the overhead rack in question within an hour before the accident (A., p. 114, D of Hansen); and that the luggage seemed to be properly placed therein (A., p. 114, D of Hansen). Petitioner's on-duty coach attendant testified that the baggage on the racks was "O. K." when observed about a half-hour before the happening of the accident (A., pp. 102, 103, D of Grants).

ARGUMENT.

No reason suggested by Rule 19 or any other "special or important reason" for the granting of a writ of certiorari in this case is stated anywhere in the Petition, amplified in the argument as required by Rule 23 (h), or otherwise apparent from anything in the Petition or Record.

By its general verdict the jury found Petitioner responsible for negligence causing injury to Respondent, which under the evidence the jury could have found consisted of either (a) negligent failure of the coach attendants to see that baggage on overhead racks was secure, or (b) negligent operation of the train by its crew over the rough detour track, or both. There was testimony as well as documentary evidence upon which the jury could have found as a fact that at the time of the injury the coach attendants were acting as employees of Petitioner and that the Atlantic Coast Line Railroad Company, whose crew was operating the train, was either an agent or a partner of Petitioner in operating it.

The "questions presented for review" (Pet. Cert. 2-3) would require this Court to review the evidence and determine its sufficiency to present a jury question on each of the fact issues of whether at the time of the injury the coach attendants were Petitioner's employees, whether Atlantic was Petitioner's agent or partner, whether the accident occurred in Alabama or Georgia, whether Petitioner had such control over the train and baggage as to make applicable the rule of *res ipsa loquitur*, and whether the coach attendants or the train crew were guilty of causal negligence.

No reason for certiorari exists except Petitioner's desire for another review of the District Court's judgment,

which has been affirmed by the Court of Appeals as to each of Petitioner's "questions." If the evidence is reviewed, as was done by the courts below, it is clear that it is sufficient to support the submission of each fact issue to the jury and to support a finding on that issue for the Respondent.

QUESTIONS 1, 2, AND 3.

Petitioner's Responsibility for the Acts of the Coach Attendants and Train Crew.

(a) Employee Relationship of Coach Attendants to Petitioner.

The evidence is more than ample to support a finding that at the time of the injury the coach attendants, whose duty it was to see that the overhead baggage was secure, were in the employ of Petitioner.

The coach attendants in charge of the car in which Respondent was riding when injured were Petitioner's employees West and Grants, who were on duty and in charge of said coach car all the way from Chicago to Jacksonville (A., pp. 57, 80). West had served on coaches of the South Wind train in Petitioner's employ ever since the train was inaugurated in December, 1940 (A., p. 58, D of West). Grants had been in Petitioner's employ thirty years (A., p. 81, D of Grants). The duties of coach attendants were given them by the Petitioner and included the duty of placing baggage on overhead racks in the coach cars and looking after the same during transit to keep the same in proper place thereon to prevent it from falling (A., p. 60, D of West; A., pp. 89-90, D of Grants). Both wore uniforms on duty, including a cap bearing Petitioner's insignia "PRR" (A., pp. 66, 67, D of West; A., p. 92, D of Grants). If the conductor asked or ordered them to do something, they did it, but otherwise they

performed the duties which Petitioner gave, told, and trained them to do (A., p. 61, D of West). There is, however, no evidence that Atlantic's conductor asked either of the coach attendants to do anything. Both of these coach attendants participated in the operation of the train all the way to Jacksonville and were paid entirely by Petitioner for their services (A., p. 123).

As far back as December of 1940, when the original arrangements were made by the Petitioner with Atlantic to operate this train equipment over the line of the latter company, it was contemplated that coach attendants in the employ of the Petitioner would be on duty while the coach cars traveled on the line of Atlantic and it was agreed between the Petitioner and Atlantic that Atlantic would not pay any part of the cost of such coach attendants (A., p. 148, Sx 3, par. 9). It was also agreed that the Petitioner should execute an indemnity agreement "covering liability for the acts or omissions of its employees when operating over the Atlantic Coast Line Railroad" (A., p. 149, Sx 3, par. 12). Petitioner did execute such an indemnity agreement, wherein it recited that certain of its passenger cars and diners "in charge of and manned by employees of the Pennsylvania move over certain portions of the line of railroad of Atlantic Coast Line Railroad Company" (A., p. 151, Sx 5), and wherein the Petitioner assumed "full responsibility and liability" for any loss or damage suffered by Atlantic "(2) by reason of any injury to person or persons . . . occasioned by or arising out of any negligent act or omission of the Pennsylvania, its officers, agents or employees, while upon the property or railroad of the Atlantic for the aforesaid purposes in connection with such passenger or dining cars."

Petitioner contends these employees were "loaned" to Atlantic and that it would not be responsible for their

conduct (Pet. Cert., pp. 4, 17, 18). The cases of **Martin v. Anniston Foundry Co.**, 259 Ala. 633, 68 So. (2d) 323, and **Delcher Bros. Storage Co. v. Reynolds and Manley Lumber Co.**, 80 Ga. App. 288, 55 S. E. (2d) 684, do not support that contention. In both of those cases there was evidence that the employees involved were loaned or borrowed.

There is no evidence whatever in the Record here that Atlantic borrowed these coach attendants from the Petitioner to perform their duties as coach attendants on its line. As already pointed out, the duties of the coach attendants all the way to Jacksonville given them by the Petitioner included looking after the baggage on the racks to prevent the same from falling therefrom. This was not a duty given them by the conductor of the Atlantic. They were not "loaned" employees in the employ of Atlantic. Rather, there is tacit admission on the part of the Petitioner over its signature in the indemnity agreement (A., p. 151, Sx 5) hereinbefore mentioned that certain passenger cars and diners of the Petitioner were in charge of and manned by employees of the Pennsylvania as they moved over certain portions of the Atlantic line. This is the agreement which Atlantic required from the Petitioner with regard to the operation of the South Wind train (A., pp. 147-150, Sx 3, 4; A., pp. 141, 142).

Whether or not the coach attendants were Petitioner's employees was a fact question upon which there was ample evidence to support an affirmative finding as part of the general verdict, and the Court of Appeals properly so held (App. to Pet. Cert. 26-27).

(b) **Agency Relationship of Atlantic to Petitioner.**

The evidence is sufficient to support a finding that Atlantic, whose crew was operating the train over the rough detour track, was the agent of Petitioner, who undertook

to transport Respondent all the way from Indianapolis to Jacksonville.

In Petitioner's timetable for its South Wind train, which it published and made available to the public, including Respondent (A., p. 143, S par. 16 and Ox 7 to 8) and which Respondent consulted (A., p. 16), the Petitioner advertised said train as providing through service from Chicago to Florida via Indianapolis, and that reclining coach car through seats could be reserved from Chicago to Jacksonville. This timetable is headed in large bold face type letters:

"PENNSYLVANIA RAILROAD
SERVING THE NATION
THROUGH SERVICE—CHICAGO—
INDIANAPOLIS—FLORIDA"

The only railroad companies named or indicated on the reserved coach seat ticket which Petitioner issued and sold to Respondent through its selling agent were Indianapolis Union Railway Company and the Petitioner by the letters "PRR" as the "issuing carrier" (A., p. 146, Sx 2). The charge made by Petitioner for the reserved seat from Indianapolis to Jacksonville was retained entirely by the Petitioner (A., p. 142, S par. 14).

The car on which Respondent was sold a reserved seat in consideration of a fare which was retained entirely by Petitioner was in charge of Petitioner's attendants during the entire trip, as detailed, *supra*, and these attendants performed duties as specified by Petitioner among which was the duty to see to it that baggage on overhead racks was secure and would not constitute a hazard to passengers.

This was ample evidence from which the jury could find that Petitioner, as principal, undertook to see to it

that Respondent would be transported to Jacksonville in a particular coach car and in a particular reserved seat, and that for the purpose of that undertaking the Atlantic was constituted and acted as Petitioner's agent.

Although Petitioner was not by law required to undertake to transport a passenger beyond its own line to a destination on a line of another carrier, the law nevertheless permitted the Petitioner voluntarily to undertake to transport Respondent to Jacksonville in the reserved coach seat for which it issued a seat ticket to the Respondent, with connecting carriers acting as its agents for that purpose.

When a common carrier enters into such an undertaking, a connecting carrier that assists in the performance of such undertaking is for that purpose regarded as the agent of the undertaking carrier and the employees of the connecting carrier are, as regards to such passenger, regarded as the employees of the undertaking carrier.

IV **Michie, Carriers** (1915), p. 3315, Sec. 3677;
10 **Am. Jur.** (Carriers) 427, Sec. 1693.

The Court of Appeals properly held the evidence sufficient to support a finding that Atlantic was Petitioner's agent (App. to Pet. Cert. 27).

(c) **Partnership Relationship Between Atlantic and Petitioner.**

The evidence is sufficient to support a finding that Atlantic and Petitioner were in fact partners in the operation of the train, thereby rendering Petitioner liable for Atlantic's negligence.

The South Wind train was advertised in a display advertisement over the names of the Petitioner and of the L. & N. as providing through services from Chicago to

both Florida Coasts (A., p. 142, Ox 8). Atlantic also advertised the South Wind (A., p. 49).

In the locomotive agreement (A., pp. 153-162, Sx 6) between Petitioner, the L. & N., and Atlantic, it is recited in the preamble that "the parties hereto operate a through train between Chicago, Illinois, and Jacksonville, Florida, known as the 'South Wind' train," and in Section VI of that agreement it is stated that the locomotives of said train are "operated **in joint service** under this agreement." (Emphasis supplied.) In Section I of the agreement, Petioner and Atlantic agreed to provide the diesel locomotives for moving the train between Chicago and Jacksonville and the L. & N. agreed to pay a rental to Petitioner and Atlantic for the use made by L. & N. of the locomotives in moving the train over its line. It is agreed in Section III that costs and expenses incident to servicing and preparing the diesel locomotives at all terminals, and for fuel, lubricating oil, and other locomotive supplies shall be "pooled." Section IV provides the Petitioner shall assemble the costs and charges, distribute the same among the parties on the basis of certain track mileage percentages set out in Section II, and that Petitioner should be paid $20.00 per month for its said accounting services. Section V deals with costs and repairs to the locomotives. Section VI also provides a definition of possession of the locomotives involved and that the party in possession indemnifies the owner thereof against liability, loss, or damage to the locomotives due to the fault of the party in possession or caused by fire, lightning, storm, etc. It also provides that each party shall protect and indemnify and save harmless each of the other parties against claims, liability, judgments, suits, and costs, to which another party may be subject by reason of injury to or death of a person and damage to property arising from the use, movement, or operation of any of the locomotives while in possession of a party.

The train for the trip in question was made up by the Petitioner in Chicago and had three diesel locomotives, two of which were owned by the Petitioner and one by the Atlantic. It had a total of eighteen cars consisting of two dining cars, both owned by the Petitioner; ten pullman cars, of which the Petitioner owned six, Atlantic owned two, and two were owned by other railroad companies; four coach cars, one of which was owned by each the Petitioner, the Atlantic, the L. & N., and one by another company; one lounge-coach car, owned by the Petitioner; and one baggage car, owned by another company (A., p. 140, S par. 9).

From Chicago through Indianapolis to Louisville the train was operated wholly by employees of the Petitioner. These consisted, in addition to the conductors and brakemen and the locomotive crew, of a total of seventeen employees constituting the dining car crews and the coach car attendants. Said seventeen employees of the Petitioner continued on duty on said train all the way to Jacksonville, and in the performance of their duties they "participated" in the operation of the train all the way to Jacksonville and were paid for their services entirely by the Petitioner (A., pp. 120-123, Ans. to Interrog. 10-12). At Louisville a locomotive crew, a conductor and a brakeman of L. & N. replaced those of the Petitioner. At Birmingham the train was rerouted from its regular track, which went to Montgomery, over a track of the Atlantic extending through Waycross, Georgia, to Jacksonville, Florida, and at Birmingham a locomotive crew, a conductor, and a brakeman of Atlantic replaced those of L. & N. (A., p. 141, S. par. 12 and amendment thereto, A., p. 163; A., p. 45). Petitioner's coach car attendants, its bar-lounge attendant and its dining car crew continued on duty all the way to Jacksonville (A., p. 122).

The only destination designated on any of the detachable parts of the passenger ticket (A., p. 145), issued by

Petitioner and sold to Respondent by Petitioner's selling agent, is Jacksonville, Florida. On the ticket there appear by their initials the names of the Petitioner and of L. & N. and Atlantic, indicating that the transportation would be over their respective lines between certain points. The fare in the amount of $52.65 paid by Respondent for her through passenger ticket was divided among the three participating railroad companies, so that Petitioner received $9.16 thereof, the L. & N. $24.72, and the Atlantic, $18.77 (A., p. 142, S par. 14).

The jury could properly find from the foregoing evidence that a partnership relationship existed between the Petitioner and the Atlantic in the operation of this train at the time and place of the accident in question. The parties obviously had a joint interest in the operation of the through South Wind train, and they obviously had a community of interest in the profit and loss of the through business done by this train. This train clearly was inaugurated and operated for the purpose of capturing through tourist transportation business between Chicago and points in Florida for the mutual financial benefit of the Petitioner, the L. & N., and Atlantic.

The law is clear that common carrier railroad companies may validly associate themselves for the purpose of jointly operating a through train on a route made up of their connecting tracks. If they do so and have a joint interest and community in the profit and loss of such business they may in fact constitute a partnership for the purpose of such business.

10 **Am. Jur.** (Carriers), 428, Sec. 1694;
Lehigh Valley R. Co. v. DuPont (C. A. 2), 128 Fed. 840, 845, 846;
IV **Michie, Carriers** (1915), p. 3314, Sec. 3673.

The Court of Appeals properly held the evidence sufficient to support a finding that Atlantic and Petitioner were partners (App. to Pet. Cert. 27).

(d) Tariff and Ticket Disclaimer of Liability Does Not Absolve Petitioner.

Petitioner could not avoid liability for negligence in the operation of the train by its agent or partner, Atlantic, or for negligence of its own coach attendant employees by any provision in its tickets or tariff purporting to absolve itself from liability for accidents occurring beyond its own line. In point is 10 **Am. Jur.** (Carriers) 428, Sec. 1694, where it is said:

> "The initial carrier may become liable for the acts of a connecting carrier, **regardless of restrictions and limitations stipulated in the ticket,** because of the existence of a partnership relation between it and the connecting carriers, or an arrangement whereby the initial carrier controls or operates its own and the connecting lines as one continuous system, or jointly with the other carriers. The exigencies of modern travel and the rapid growth of passenger traffic, have induced some carriers, whose lines are conducted as a single system for the purposes of the traffic between different points originating upon either line, to constitute themselves as a partnership for the business of such traffic. In such event, although the general management of each road is retained by the corporation owning it, the several corporations are as to such business partners and liable upon the principles of the law of agency." (Emphasis supplied.)

To the same effect is the decision by this Court in **New York Central R. Co. v. Lockwood,** 84 U. S. (17 Wall.) 357, 384, 21 L. Ed. 627, 641, where the Court said:

". . . That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

This is the law in Indiana, where the transportation contract was entered into. The Supreme Court of Indiana in **Rosenfeld v. Peoria, Decatur and Evansville R. Co.**, 103 Ind. 121, 123, 2 N. E. 344, 345, 346, said:

". . . It is the settled law of this State, abundantly supported by authority and reason, that while common carriers may, by contract, limit their liability as insurers, they can not, by contract, relieve themselves from the consequences of their own negligence or fraud. The law will not allow a common carrier to contract to be safely negligent or dishonest . . ."

The Petitioner cites **Louisville and Nashville R. R. Co. v. Chatters**, 279 U. S. 320, 73 L. Ed. 711 (Pet. Cert., p. 17) to its contention that the limitation of liability in Petitioner's tariff was binding on the Respondent and that the Petitioner is therefore not liable for Respondent's injury which she received on the line of Atlantic. The cited case does not support that contention because of the material difference in the facts of that case and of the instant case. In the **Chatters** case no employee of the initial carrier was on duty on the train while it was traveling on the line of the connecting carrier where the accident occurred. In an effort to overcome this material difference, the Petitioner erroneously states that the "undisputed evidence" shows that Grants and West were under the complete control of Atlantic's conductor at the time of the accident and were "loaned employees" (Pet. Cert., pp. 17, 18). That statement simply is not supported by the record. Coach attendant West in his deposition testified as follows concerning the source of his duties while in charge of coach cars all the way to Jacksonville:

"Q. Now, are those the duties that you are to do, are they the duties the Pennsylvania Railroad Company, your employer, has you do?

"A. Yes, sir.

"Q. And does anyone else tell you what to do on that train, that changes your duties any?

"A. I take orders from the conductor. If he asks me to do something, I have to take orders from the conductor. That's all.

"Q. But otherwise you do the things that your employer has trained you to do?

"A. Yes, sir.

"Q. And told you to do?

"A. Yes, sir" (A., p. 61).

The names of West and Grants as coach attendants are included in the list of Petitioner's employees in answer to Interrogatory 10 (A., pp. 120-122) who, as shown by the answers to Interrogatories 11 and 12 (A., pp. 122-123), did "participate in the operation of said 'South Wind' train from Louisville, Kentucky, to Jacksonville, Florida" and "were paid for their services entirely by the Petitioner." There is no evidence whatever in the Record to show that these employees were loaned to Atlantic or that Atlantic's conductor ordered or asked them to do anything.

In the **Chatters** case a passenger was injured on the line of a connecting carrier (Southern Railway Company) by pieces of flying glass from a window which was shattered when an outside window screen of the car in which he was riding came loose and slammed against and shattered the window. Both the connecting carrier (Southern Railway Company) and the initial carrier (the Louisville and Nashville Railroad Company) were sued by the passenger. The Court held that a verdict should have been directed in favor of the initial carrier (L. & N.) for the stated reason that "the complaint contained no allegation that Re-

spondent's injury was due to the negligence of the Louisville & Nashville. He contented himself with alleging and proving at the trial the accident and injury while he was traveling over the line of the Southern on a through ticket purchased from the Louisville & Nashville." The Court further said, "We think also there was no evidence for the jury of negligence of the Louisville & Nashville . . ." The train was a through train from New Orleans to Washington, D. C., and was operated under an agreement among three carriers which the Court said "was not offered in evidence." The Court pointed out that "the cars composing the train were furnished by the three carriers on the basis of their respective mileage; that each furnished locomotive power and train crews over its own line; and that each, while in possession of the **train, was in exclusive control** of it." (Emphasis supplied.)

The **Chatters** case is not in point on any contested issue in the instant case, because the material pleadings and facts in these two cases are so materially different that they are completely distinguished. There was no allegation and no evidence of negligence of the initial carrier in the **Chatters** case, as there is in the instant case. There, there was no allegation or evidence that an agency or a partnership existed between the carriers, whereas here there is such an allegation and such evidence. There, a complete change of train crews occurred when the train left the initial carrier's line and none of its employees continued on duty on the train while on the connecting carrier's line, whereas here a total of seventeen of Petitioner's employees continued on duty on the train all the way to Jacksonville over lines of connecting carriers. There are other distinguishing facts, but the foregoing suffice to make the **Chatters** case completely inapplicable, as the Court of Appeals found in its opinion (App. to Pet. Cert. 28).

QUESTION 4.

The State in Which the Injury Occurred

At page 19 of the Petition, Petitioner contends that Instruction No. 18 was erroneous because it permitted the jury to speculate as to whether the accident occurred in Alabama or in Georgia. That contention is without merit. It is stipulated as a fact in Paragraph 8 of the Stipulation of Facts (A., p. 139) that the accident in question happened while the train was traveling southward on a track of the Atlantic at a point either in Alabama or Georgia near the boundary line between those states. It occurred in the darkness of nighttime and apparently no one observed whether the train then was on one or the other side of the line.

The determination of whether the accident happened on the Alabama side or on the Georgia side of the boundary line would be important only if the laws of those states were materially different as to the degree of care required of common carriers for protection of their passengers against injury. But there is no material difference in those laws, since the degree of care required in each of these states is substantially the same. In Alabama it is the "highest degree of care" and in Georgia it is "extraordinary diligence."

However, if it had been necessary for the jury to determine on which side of the boundary line the accident occurred, there is sufficient evidence from which it could make that determination. In Exhibit 1 to the deposition of Pearl Hansen (A., p. 109), it is said that injury to Respondent occurred "at or near Cragford, Alabama, at about 4:00 a. m., on December 23, 1957." That would be a sufficient basis on which the jury could determine that

the accident happened in Alabama. In Paragraph 8 of the Stipulation of Facts (A., p. 139) it is stipulated that "the train was stopped at Manchester (Georgia) to permit a physician to enter the car and treat her for injuries . . .," from which the jury could reasonably infer that the accident happened in Georgia.

In view of the foregoing evidence, there was no error in giving Instruction No. 18, as the Court of Appeals held in its opinion (App. to Pet. Cert. 28-29).

QUESTION 5.

Applicability of Res Ipsa Loquitur.

In addition to direct evidence of negligence of Petitioner's coach employees and of Atlantic, acting as agent or partner of the Petitioner, there was a permissible inference by the jury of negligence attributable to the Petitioner under the rule of *res ipsa loquitur*. This rule applies because the evidence shows that the South Wind train and the coach car in which Respondent was injured were in the exclusive joint control of the Petitioner and of Atlantic acting as Petitioner's agent or partner, and because of the circumstances surrounding the accident. The fact that passengers may have taken pieces of baggage from the rack and returned the same thereto at some time or other does not militate against the fact of exclusive control of the train and coach car by the Petitioner, its agent, or its partner. It was the movement of the train in that exclusive joint control on a rough freight track that caused the baggage to "bounce" from the rack and to injure the Respondent. There is evidence that no person had been near the rack within an hour before the accident happened (A., p. 114, D of Hansen), and that the baggage on the rack was "O. K." about a half hour previously, when

Petitioner's coach attendant Grants last observed it (A., pp. 102, 103, D of Grants). Hence, there is evidence upon which the jury could properly rule out the possibility that the piece of baggage bounced off the rack and injured Respondent due to handling by a passenger.

It was not error for the Court to give an instruction on *res ipsa loquitur* in these circumstances. Such an instruction is "a rule which permits or requires an inference of negligence to be drawn from the fact of an accident plus the circumstances which characterize the accident. It is an evidential inference, which will carry a case to the jury, but is not binding upon the jury . . ." **Eker v. Pettibone** (C. A. 7), 110 F. (2d) 451, 455 (1940). In its opinion, the Circuit Court of Appeals stated: "We have examined the record and find there was sufficient factual evidence of Petitioner's control of the coach car and the train itself to make appropriate the instruction Petitioner objects to" (App. to Pet. Cert. 29).

QUESTION 6.

Denial of Petitioner's Motion for Directed Verdict.

In support of its contention that the District Court erred in overruling its motion for a directed verdict, Petitioner argues that there is no evidence of negligence on the part of the coach attendants or train crew, and that in any event it is not responsible for their acts or omissions (Pet. Cert. 15-18).

Evidence with record references has been heretofore set out showing that the coach attendants were on duty and participated in the operation of the train all the way from Chicago to Jacksonville; that they were employed and

paid entirely for their services by the Petitioner; that they wore uniforms and caps bearing Petitioner's insignia; that they did the duties Petitioner gave, trained, and told them to do; and that their duties included placing baggage on overhead racks in the coach cars, checking the same to see that it was properly placed, so that it would not fall down or constitute a hazard to passengers; that it could have been as much as a half-hour since the on-duty attendant had been in Respondent's coach before the accident, when the train was traveling on a rough freight detour track which made the train and the baggage shake.

This evidence was sufficient from which the jury could find that the coach attendants were Petitioner's employees at the time of the accident and that they were guilty of causal negligence in failing to check the overhead baggage with sufficient frequency or to secure it sufficiently under those circumstances.

There is evidence as heretofore shown from which the jury could find that Atlantic acted as agent or partner of the Petitioner and that it negligently operated the train over its rough detour track so as to cause the baggage to fall from the overhead rack onto and injure Respondent during sleeping hours in the nighttime. As already pointed out, the track on which the train was traveling was a rough freight track on which the train was rerouted from Birmingham to Waycross and the train was operated, so that it rocked and shook, shaking the baggage on the racks and causing it to "bounce" therefrom. The train at that time was in general charge of a conductor in the employ of the Atlantic, and he permitted this baggage to remain loose on the rack during sleeping hours so it could be shaken from the rack by the movement of the train on the rough track and fall onto and injure Respondent. The train was running about two

hours late at the time. In view of the high degree of care required of common carriers by both the law of Alabama and Georgia, the jury could properly find causal negligence on the part of Atlantic acting either as agent or partner of Petitioner in the operation of the train.

The Court of Appeals properly affirmed the denial of the motion for a directed verdict and stated: "An examination of the record in this case **clearly reveals** that the issue of Petitioner's negligence was properly submitted to the jury" (App. to Pet. Cert. 26) (Emphasis supplied.)

CONCLUSION.

Respondent respectfully submits that this is not a case where any special or important reason exists for the review by this Court of the judgment below. It is not claimed that the decision of the Court of Appeals is in conflict with the decision of another court of appeals on the same matter; no important state or territorial question is involved; no constitutional provisions, treaties, statutes, ordinances, or regulations are involved; and no court has departed from the accepted and usual course of judicial proceedings.

This is simply a common-law negligence action to recover damages from a common carrier railroad that could and did, as a principal, undertake to transport Respondent from Indianapolis, Indiana, to Jacksonville, Florida, in a reserved seat in a particular coach car, with other connecting railroads acting as its agents for that purpose, in a through train operated by Petitioner and other railroads in a partnership relationship whereby Petitioner was responsible not only for the negligence of itself and its own employees, but also the negligence of its agents, regardless of any disclaimer of liability in its tariff or

tickets. The evidence amply supports the general verdict and the judgment below.

Therefore, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

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